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No. 781

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

DUO-BED CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

DUO-BED CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Duo-Bed Corporation, a Delaware corporation, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Tenth Circuit entered on November 25, 1964 (Appendix B), which decree enforces an order of the National Labor Relations Board directed against Petitioner.

The litigation arises out of Federal law—the *Labor Management Relations Act*, as amended, Act, June 23, 1947, C. 120, *Title* 1, §101, 61 *Stat.* 146, 29 *U.S.C.*, Section 151, *et seq.*—Petitioner having been charged with and found guilty of an unfair labor practice thereunder by the National Labor Relations Board.

OPINIONS BELOW

The Findings, Conclusions and Order of the Board's Trial Examiner are incorporated in toto in the order of the Board (Certified Record from Clerk of Court of Appeals*, pp. 21-2) which is reported as 145 N.L.R.B. No. 144 (Appendix A). The opinion of the Court of Appeals, upon Petitioner's petition for review of the Board's order and upon the Board's cross-petition for enforcement is reported at ..... F.2d ..... (Appendix B). The decree of enforcement is not reported (Appendix C).

*All "R" references are to such Certified Record.

JURISDICTION

The decree of the Court of Appeals was entered on the 25th day of November, 1964 (R. 5). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. When the record in an unfair labor practice proceeding shows by substantial, uncontradicted evidence that there was proper cause for discharge of the affected employee, may the National Labor Relations Board inquire into the motives and thoughts of the employer, or his agents, with respect to such discharge, make a finding of improper motive, and upon such finding order re-instatement, with back pay, notwithstanding the mandate of Congress that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause" 29 U.S.C. 160(c)?

2. Did the Court below, in considering the record in an unfair labor practice proceeding, grossly misapply or misapprehend the pertinent standards of judicial review, when it failed to assume any responsibility for the reasonableness of the inferences upon which the Board's order was predicated?

STATUTES INVOLVED

29 *U.S.C.* 160(c) provides in pertinent part,

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

29 *U.S.C.* 160(e) provides in pertinent part,

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

STATEMENT

Petitioner was charged in an unfair labor practice proceeding before the National Labor Relations Board with improper interrogation of its employees contrary to Section 7 of the Labor Management Relations Act, 29 *U.S.C.* 157 and with having discharged an employee for exercising the rights guaranteed her by the same provision (R. 6).

The Board's trial examiner found petitioner guilty of coercive questioning of its employees, of improperly motivated discharge of the affected employee, and he recommended an order requiring reinstatement with back pay and directing petitioner generally to cease and desist interference with its employees' protected activities (R. 7-

18). The Board adopted in full the trial examiner's report and proposed remedial order (R. 21-2). Petitioner sought review of the Board's order from the Court of Appeals for the Tenth Circuit, and the Board cross-petitioned for judicial enforcement of its order (R. 1-3), pursuant to 29 *U.S.C.* 160(e) and (f), the acts complained of having been committed in Wichita, Kansas, petitioner's principal place of business.

The record before the Court of Appeals disclosed that on April 4, 1963, Betty R. Dickerson, the affected employee, following repeated demands by her for a wage increase, was discharged in the course of a heated argument with her foreman, occurring in the presence of her fellow employees (R. 47, 42-4, 48, 56). She testified that the incident began and ended as follows:

> "Mr. Minter [Petitioner's foreman] said there was no raises being given to the factory at all and I said, 'Well, either there are or some of the foremen around here are the biggest liars around here that ever lived.'" (R., p. 36).
>
> "Q. How did you happen to go into these other grievances the day you were discharged, the other complaint of Duo-Bed? A. I mentioned to him that Duo-Bed wasn't doing us right and hadn't been doing us right all along, some of us about our raises.
>
> "Q. And you indicated to him you were pretty unhappy about it. A. Yes.
>
> "Q. And was it about this point that you said, 'I won't *quite*, you will have to fire me'? A. No.
>
> "Q. Was this before or after that you said this? A. It was at the culmination of our conversation. That was the last thing that I said. He said, 'If you are unhappy, why don't you quit?' I said, 'I am not about to quit, you will have to fire me. That is the only way you will get rid of me.'" (R., pp. 47-8).

The foreman testified that he fired Mrs. Dickerson because she practically demanded it (R. 88).

The uncontradicted testimony further showed that petitioner had been released from a Chapter 11 Bankruptcy proceeding early in 1963 (R. 46, 62-3), that Mrs. Dickerson's fellow employees had subsequently on many occasions collectively sought wage increases, without any recrimination by Petitioner, that all requests for pay increases courteously made were courteously received (R. 77, 79, 47), that Mrs. Dickerson's employment record was far from satisfactory (R. 76), and that she had written and circulated a petition for a wage increase several days prior to her discharge (R. 104). There was also testimony from Mrs. Dickerson's fellow employees, partially substantiated by her, that she had told them immediately preceding her discharge that she was going to get a raise or get herself fired (R. 95, 48).

The "coercive" questioning occurred when several of Mrs. Dickerson's co-employees asked the foreman for a raise or that he call a meeting of the employees to discuss with them the prospects for wage increases. They told the foreman that a petition was being circulated, he asked by whom, and they declined to answer. He commented that that was no way to get an increase (R. 96, 78, 70-71).

The Board characterized the occasion of Mrs. Dickerson's discharge as a pretext seized upon by the foreman to discharge a "satisfactory employee" because of her engagement in protected activities (R. 14). The Court of Appeals noted some discrepancy between the trial examiner's recital of the evidence and the actual testimony, and the Court, contrary to the Examiner's "satisfactory" characterization of Mrs. Dickerson's work, found that the record showed her to be "a dissident and annoying employee" (Appendix B, p. A19).

As considered by the Court of Appeals, the record simply revealed: the circulation by Mrs. Dickerson of a petition for a wage increase which was similar in all respects to verbal requests freely made by other employees, responsive inquiries by petitioner's foreman concerning authorship of the petition, his comment as above, followed by an incident entirely precipitated by Mrs. Dickerson (R. 45), in the course of which she became angry and abusive with her foreman in the presence of her fellow workers and dared her foreman to fire her, which he did. In concluding that the evidence, so viewed, was "susceptible of an inference" (Appendix B, p. A19) that Mrs. Dickerson was discharged because of her activity in regard to the petition, the Court below failed to heed the Congressional prohibition against reinstatement of employees discharged for cause, and it grossly misapplied or misapprehended its function on review of the Board order.

REASONS FOR GRANTING THE WRIT

I.

The Court Below, in Reviewing the Record in an Unfair Labor Practice Proceeding Involving an Order of the National Labor Relations Board Requiring Employee Reinstatement with Back Pay, Gave No Effect to the Congressional Prohibition of Such Orders When the Discharge Is for Proper Cause (29 U.S.C. 160(c)), Which Prohibition Is Applicable in All Such Cases and Has Not Heretofore Been Fully Considered by This Court.

In sustaining generally the constitutionality of the legislation preceding the Labor-Management Relations Act, this Court upheld the validity of employee reinstatement orders with back pay, and in so doing, defined incidentally the difficult problem inherent in all such cases.

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts." *National Labor Relations Board* v. *Jones & Laughlin S. Corp.*, 301 U.S. 1 at pp. 45-46.

By granting to the National Labor Relations Board the authority to investigate and determine the "true purpose" of employee discharges, the Congress had, of course, opened the door for inquiry by an administrative board into the motives and thoughts of employers as a special class singled out for such peculiar governmental scrutiny. In a society to whose members the intrusion of any agency into such an area suggests the classic affronts to personal integrity,[1]

---

1. "There has been a good deal of somewhat superfluous discussion concerning the different kinds of inquisition. The distinction drawn between the papal, the episcopal, and the Spanish inquisition, did not, in the sixteenth century, convince many unsophisticated minds of the merits of the establishment in any of its shapes. However classified or entitled, it was a machine for inquiring into a man's thoughts, and for burning him if the result was not satisfactory." Motley, *The Rise of the Dutch Republic*, Vol. One, pp. 278-79 (Everyman's Library Ed.).

"What was more serious for the common-law tradition of liberty under law judicially maintained, the time was one of administrative tribunals with a summary, Romanized procedure and scant respect for the rights of the individual Englishman, when those who exercised the powers of politically organized society were active to achieve results for the government. The King's Council, the Star Chamber, and the Court of Requests are characteristic tribunals of this period." Pound, *Development of Constitutional Guarantees of Liberty*, p. 29 (Yale).

some effort to limit the power initially conferred, without frustrating the legitimate need for balance in employer-employee relations, was surely predictable. In 1947, Congress directed the Courts of Appeal, upon review of Board orders, to "assume more responsibility for the reasonableness and fairness" of Labor Board decisions. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 at 490.

In the *Universal Camera* case the Court was construing the 1947 enactment providing that, upon review of Board orders by Courts of Appeal, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 *U.S.C.* 160(e). Although the case involved an employee's discharge, the Court did not pass upon the significance of the further 1947 enactment specifically applicable in discharge cases, and providing:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." *29 U.S.C.* 160(c)

The above provision was eventually considered in *National Labor Relations Board* v. *Local Union No. 1299* 346 U.S. 464, but the Court was there concerned with the adequacy of the evidence involved, rather than with the general significance of the amendment. The Court did refer to the pertinent Congressional conference report and commented, in seemingly direct contradiction of the terms of the report, that the new provision added nothing to existing law.

> "Congress, while safeguarding, in §7, the right of employees to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection,' did not weaken the underlying con-

tractual bonds and loyalties of employer and employee. The conference report that led to the enactment of the law said:

> "'[T]he courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. . . .
>
> . . .
>
> "'. . . Furthermore, in section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, *and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity.*' H.R. Rep. No. 510, 80th Cong., 1st Sess. 38-39.
>
> "This has been clear since the early days of the Wagner Act." (Emphasis ours) 346 *U.S.* 464 at pp. 473-74.

The Court, later in this opinion reiterated the apparent problem in all discharge cases, but it offered no guidance to the Board or to the Courts primarily responsible for review of Board orders.

> "The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge." 346 *U.S.* 464 at 475.

The dissenting opinion objected to the failure of the Court to define the relevant principles in discharge cases and predicted continued uncertainty in this area of the law.

> "The Board and the courts of appeals will hardly find guidance for future cases from this Court's reversal of the Court of Appeals, beyond that which the specific facts of this case may afford. More than that, to float such imprecise notions as 'discipline' and 'loyalty' in the context of labor controversies, as the basis of the right to discharge, is to open the door wide to individual judgment by Board members and judges. One may anticipate that the Court's opinion will needlessly stimulate litigation." 346 *U.S.* 464 at 481

Precise verification of the dissenting prophecy is disclosed by a comparison of the Board's order in the instant case with its almost concurrent order in *Metals Engineering Corporation and International Union of Electrical Radio and Machine Workers, AFL-CIO,* 148 NLRB No. 14. The cited case also involved interrogation as to protected activities, statements found to be coercive, and a discharge for alleged insubordination. The Board ruled the exact opposite of its ruling in the instant case.

> "Against this clear and persistent evidence of insubordination there is only the evidence that Luster was involved in a union organizing compaign, about which he had been interrogated, to support a finding that his discharge was unlawfully motivated.[4] We conclude that fact standing alone does not provide the perponderance of evidence necessary to support a conclusion that Luster was discharged for his union activities." 148 *N.L.R.B.* No. 14, pp. 3-4.

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4. Although there was no direct evidence offered that Benko or vice-president Ramsey were aware of Luster's union activity, and Benko and Ramsey flatly denied any knowledge that Luster was involved in the union campaign, the Trial Examiner found that Supervisor Bowman in reporting the memo incident which precipitated Luster's discharge, must have apprised Benko of Luster's union role. Bowman testified to the contrary. In view of our findings, we conclude that whether or not Benko had this knowledge is not determinative of the legality of Luster's discharge.

We submit that Congress clearly attempted to prevent such uncertainty and inconsistency in discharge cases arising under the Labor-Management Relations Act by its 1947 enactments. If the provisions then adopted changed the existing legislation in no respect, as this Court has intimated, then it must be assumed that the Congress was legislating to no purpose. The very notion itself and the language of the conference report above quoted repel any such conclusion. We suggest that Congress intended to outlaw the probing by administrative agencies into the thoughts and emotions of litigants when it prohibited reinstatement orders in discharge cases for proper cause—*even though the acts justifying the discharge were committed in connection with concerted activity.*

Thus, when the Court below concluded from the record before it that Mrs. Dickerson was a dissident and annoying employee, which her own account as to the discharge incident clearly shows, Congress directed an end to the inquiry, since an employee's engagement in a protected activity affords no immunity to discharge for misconduct.

Whether the Court agrees with the above suggestion as to the intent of the Congress is of secondary importance to the vital need for intelligible standards leading to the elimination of speculation and uncertainty in employee discharge cases. The present situation will persist so long as employers are told that they may discharge a "dissident and annoying employee", provided that an administrative board, possessing special competence in such matters, is satisfied that the employer had no improper thoughts when he made his otherwise lawful choice.

Writing from a different legal perspective, but concerned with the basic values here involved, Ernst & Schwartz teach us as follows:

"The indignity one feels about an invasion of the thing that he protects against the state above all others, namely, his own privacy, constitutes the core of a person's very self-respect.

. . . .

"It requires a conscientious and sophisticated society to recognize such subtle injuries. More than that, it requires a society dedicated to concern for the individual in the face of the mesmerizing depersonalization that operates so insidiously in our modern world. There is no privacy in a totalitarian state except for the privacy of the dictator. The aim of a democratic society is to maintain the self-respect of the individual as best it can. In this connection, the protection by the state of complaints that may seem trivial, but are nevertheless uniquely personal, is, in some way, a measure of the success and value of that society." *Privacy*, pp. 2-3 (Macmillan).

II

By Failing to Assume Responsibility for the Reasonableness of the Board's Order, upon Review Thereof, the Court Below Grossly Misapplied or Misapprehended the Controlling Standards Applicable in Such Cases.

Although the Court below found on the record before it that the discharged employee was "dissident and annoying", it held that the evidence was "susceptible of an inference" that she was discharged because of activities in connection with the petition for a wage increase which she had written and circulated (Appendix B, p. A19). In so holding, the Court misapprehended or grossly misapplied the governing standards of review, thereby inviting the scrutiny of this Court. *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404 at 408.

"Susceptibility of an inference" was the standard applied by the Court below both here and in *N.L.R.B.* v. *Bear Brand Roofing, Inc.*, 10 Cir., 312 F.2d 616, the only case cited by it as precedent for its holding (Appendix A, p. A1). In the cited case the Court said:

> "The inference drawing province of the Board, in situations like this, is too well established to justify discussion. Suffice it to say that the uncontroverted testimony was susceptible to the inference that the Board did draw, and on which its order rests. Our inquiry ends there." 312 F.2d at 618.

Regardless of any dictionary meaning that may be spun from "susceptibility of an inference", in practice, as illustrated by this case, it does not represent the appropriate standard for review of Board orders. It does not meet the congressional demand that courts must assume more responsibility for the reasonableness and fairness of such orders. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 at 490.

The trial examiner and the Board drew the inference as to the petitioner's improper motive for discharge squarely upon the characterization of Mrs. Dickerson as a "satisfactory employee" and the disbelief of petitioner's claim that her conduct was disrespectful (R. 14). By rejecting the Board's characterization upon the very evidence of the incident involving Mrs. Dickerson's discharge, the Court below necessarily eliminated any ground for the inference of improper motive upon which the Board rested its case. There was, as can be shortly demonstrated, no remaining ground for any reasonable or fair inference to support the Board's order.

While it is true that petitioner's foreman asked several employees as to the identity of the person circulating the petition and commented that it was no way

to get a wage increase, these facts, alone, would not sustain the further necessary inferences of knowledge and improper motive. The employees simply refused to answer the foreman's inquiries (R. 78, 73). Furthermore, the pertinent conversation with the foreman was initiated by two employees who had met with him openly to request a pay raise for the girls in Mrs. Dickerson's department (R. 70-71). It was uncontradicted that all such requests for pay increases, courteously presented to petitioner's foreman, had been courteously considered (R. 71, 75). The only employee who was fired for such activity was Mrs. Dickerson, when she insulted her foreman and dared him to fire her in the presence of her fellow employees (R. 48, 42). The only reasonable inference to be drawn was that Mrs. Dickerson, by word and act, demanded to be fired, and that was the simple explanation given by petitioner's foreman (R. 88). Any inference of improper motive must necessarily rest upon sheerest speculation.

We do not suggest that the Court below was required to select the most plausible of competing *reasonable* inferences, but it was bound to reject inferential speculation and to assume responsibility for the fairness and reasonableness of the inferences giving rise to the order it enforced. The Congress singled out the type of review it expected in connection with discharge cases under its 1947 enactments.

> "Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon* v. *N.L.R.B.*, 153 Fed. (2) 480), will not be entitled to reinstatement." Committee of Conference, House Report No.

510, June 3, 1947, U. S. Code Congressional Service, 81st Congress, First Session, p. 1161.

The case cited in the Congressional report sets the standard intended by Congress, further enunciated by this Court, and either grossly misapplied or misapprehended by the Court below.

> "Little need be said concerning the Board's finding that petitioner interfered with, restrained and coerced its employees in violation of Section 8 (1) of the Act. Here again the Board relies largely on what it terms the illegal discharge of Baker, Coale and Crince, and petitioner's action in granting a wage increase. We have already discussed these matters and reiterate that in our view *no reasonable inference can be drawn* which will support the Board's finding in this respect." (Emphasis ours). 153 F.2d 480 at 489.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DUO-BED CORPORATION and TEAMSTERS UNION LOCAL 795, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND UPHOLSTERERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO	**Case No. 17-CA-2182**

Decision and Order

On October 18, 1963, Trial Examiner Owsley Vose issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

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1. The Respondent's request for oral argument is hereby denied, as the record, including the exceptions and brief, adequately presents the issues and positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the Respondent's exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner.[2]

Dated, Washington, D. C., February 5, 1964.

Frank W. McCulloch, Chairman
Boyd Leedom, Member
Gerald A. Brown, Member

(Seal) National Labor Relations Board

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2. The Recommended Order is hereby amended by substituting for the first paragraph therein, the following paragraph:

> Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Board hereby orders that Respondent, its officers, agents, successors, and assigns, shall:

The Appendix attached to the Decision is hereby amended by adding the following immediately above the double line at the bottom of the notice:

> NOTE: We will notify the above-named employee if presently serving in the Armed Forces of the United States of her right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

DUO-BED CORPORATION Respondent and TEAMSTERS UNION LOCAL 795, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND UPHOLSTERERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO Charging Parties	**Case No. 17-CA-2182**

Robert Butler, of Washington, D. C., for the General Counsel.

Gerrit Wormhoudt, of *Fleeson, Gooing, Coulson & Kitch,* of Wichita, Kan., for the Respondent

Before: *Owsley Vose,* Trial Examiner

Trial Examiner's Decision

Statement of the Case

Upon charges filed by the Charging Parties on May 4 and July 29, 1963, the General Counsel on August 8, 1963, issued a complaint alleging that the Respondent, in violation of Section 8(a)(1) of the Act, had interrogated employees concerning their concerted activities for their mutual aid and protection and had discharged Betty R. Dickerson for engaging in such activities. The Respondent filed an answer denying the commission of any unfair labor practices. The case was heard before me at Wichita, Kansas, on September 17, 1963. The General Counsel and the

Respondent appeared and were represented at the hearing, were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to present oral argument. The filing of briefs was waived.

Upon the entire record and my observation of the witnesses, I make the following:

Findings and Conclusions

I. The Respondent's business

The Respondent has its principal office and place of business at Wichita, Kansas, where it is engaged in the manufacture of hotel furniture, draperies, bedspreads and related products. The Respondent annually ships more than $50,000 worth of finished products to customers located outside of Kansas. Upon these facts I find that the Respondent is engaged in commerce within the meaning of the Act, and that it is appropriate for the Board to assert jurisdiction.

II. The unfair labor practices

A. *Sequence of events culminating in Dickerson's discharge*

In January 1963, the Charging Parties commenced a joint organizing drive among the Respondent's employees but it was apparently not successful and before long all organizing activity came to a standstill. However, interest in a pay raise for the employees in the Sewing Department remained at a high level. In their conversations with one another the subject of a pay raise for the girls was a frequent topic of discussion.

Betty R. Dickerson, one of the employees in the Sewing Department, spoke to Frank D. Minter, the supervisor in the Sewing Department, several times in February and

March 1963, about the possibility of a merit raise for the girls in the department. Minter's usual reply, according to his testimony, was that he would have to look into the matter.

On the morning of April 2, 1963, Dickerson engaged in a conversation about pay raises with employees Mary Petersen and Lillian Alvarez as they sat at their work stations before the workday began. Petersen expressed the view that this was not a propitious moment to ask Minter for a raise, and explained that Minter was having difficulty with the work and was too busy at that time. Dickerson proposed preparing a petition and submitting it to the office in an effort to persuade management to consider the employees' desire for a wage increase. Petersen was lukewarm to this proposal and Alvarez was frankly opposed. Nevertheless, Dickerson, on the spur of the moment, decided to prepare such a petition. Just before the morning bell rang, Dickerson hastily printed in ink on a piece of note paper the following statement:

> We the women of the Sewing Dept. herby petition Management for a 10¢ per hour raise that is long over due.

Below this text was placed a large irregular seven-sided figure with crossed lines through the middle, which was intended to provide space for the employees to sign their names without revealing the order in which they signed. Below this figure and on the back of the paper were listed reasons for granting a merit increase.[1]

During the morning break Dickerson gave the petition to Petersen, who placed it upon Lillian Alvarez' desk with-

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1. These were: (1) the increased cost of living; (2) the long period (1½ years) since the last merit increase; and (3) the employees' loyalty in standing by the Respondent during its financial difficulties.

out signing it. Alvarez did not sign the petition either, but passed it on down the line. Five of the 10 to 12 employees in the Department signed the petition, including Dickerson.

After she had started circulating the petition, Dickerson went up and spoke to Supervisor Minter at his desk between the two sewing rooms. Dickerson asked Minter if he would recommend a merit raise for the girls in her department. Minter's answer was that "he would not turn in a raise because it would not do any good at this time."

Later in the day two of the signers of the petition, Frances Roach and Helen Reid, heard that the petition had been discussed with Mabel Morris, an employee in the other sewing room whom they regarded as being unduly sympathetic with management. These two girls came to Dickerson and said, "Tear the petition up, Mabel knows about it, or we will get into trouble." Dickerson complied with their request, and kept the torn pieces of paper in her purse. (At the hearing the torn scraps of paper were pieced together and the assembled document, with two pieces missing, was received in evidence in this case.) As she tore up the petition, Dickerson told the girls who had signed it that she would rewrite the petition in letter form, couch it in more tactful terms, and address it both to Frank Minter, their supervisor, and to management.

The same day Petersen and Alvarez, who had not signed the petition, went to Supervisor Minter and informed him that a petition was being circulated. As Petersen credibly testified, they suggested that perhaps "it would be wise to . . . talk to the girls and tell them the reasons why he couldn't give [them] a raise and that maybe that would stop this . . . before it got started." Petersen went on to say, "Frank, you know everyone wants a raise. We have been here a long time, and if anybody gets one,

we feel we deserve one." Minter replied, "We'll see what we can do about it." During this conversation Minter asked Petersen if she "would tell him who wrote it (the petition)." She refused to tell him.

Thereafter, Minter approached Dorothy Cohorn, who worked part time in the Sewing Department, and asked her if she "knew anything about the petition that was being circulated, if [she] had seen it." When Cohorn admitted that she had seen it, Minter inquired "if [she] had signed it." Cohorn informed Minter that she had not. Minter then commented, "Well, Dorothy, you know this is no way to get a raise."

On the evening of April 2—the day on which the petition was prepared and later torn up—Dickerson drafted and typed a second petition which presented essentially the same arguments in favor of a wage increase as the first, but which was expressed more diplomatically. Dickerson placed the second petition in a mail order catalog and brought it to the plant in the catalog the next morning. Dickerson had numerous discussions with other employees on April 3 and early on April 4 concerning what to do about the second petition. A few employees apparently favored going ahead with the second petition, others opposed, and no decision was reached on the ultimate disposition of this petition. No employee signed it.

On the morning of April 4 Art Rogers, one of the Respondent's foremen, engaged in a conversation with Dickerson in the plant. In the course of this conversation Dickerson commented about Minter's refusal to do anything about obtaining raises for the girls in her department. In reply Rogers stated that he had been getting raises for the men in his department right along.

Shortly after this conversation with Foreman Rogers, Dickerson observed Minter nearby and again asked him

if he would put in a request for a raise for the girls in her department. When Minter declared that no raises were being given at all, Dickerson disputed this, stating that if that were true "some of the foremen around here are the biggest liars that ever lived." In response Minter said that if he could show her the records, he could prove the truth of what he was saying. Dickerson replied that she would "shut [her] mouth" if he could prove it. At this point Minter commented, "It's too late for that, it's gone too far." Dickerson pointed out that the employees had stood by the Company when it was in financial difficulty and urged that the Company, now that it was back on its feet, should come forward with the raises which the employees had been denied because of the Company's financial troubles. Dickerson went on to say that she did not believe the Company had been fair as far as her wages had been concerned, and pointed out, among other things, that she had been required to help train newly hired girls who were being paid 10 cents per hour more than she was earning. Minter said, "If you feel the company has done you so dirty, why don't you quit." Dickerson rejoined, "I am not about to quit," and added that Minter "could fire [her] but that is the only way he could get rid of [her]." Admittedly, Dickerson was angry at Minter at this point. Minter admittedly replied, "Well, if that is the way you feel about it, you leave me no choice" and left Dickerson's workplace.

A few minutes later Minter came back and told Dickerson that her check was waiting for her in the personnel office. As she was gathering up her belongings Dickerson took the second petition from the catalog and handed it to Minter, saying, "Here, this is what you paid your pet rat to tell you." Minter declared, "I don't know what you are talking about." Dickerson continued, "If you want me to name her, it's Mabel Morris." Minter's

reply was, "Why now she didn't tell me, it was a process of elimination. I suspected you but didn't know until this moment for sure."[2]

B. *Subsequent events*

Later in the day after Dickerson had been discharged, Mary Petersen asked Minter, "Frank, how did you know Betty had the petition?" Minter answered, "I didn't until she gave it to me." Minter also stated in the course of this conversation that "it was against company policies . . . to circulate a petition." Madeline Robinson had a similar conversation with Minter shortly after Dickerson's discharge. She also asked Minter "how he knew that Betty was the one who had the petition." Minter's response was as follows: "I didn't know until she gave it to me. I just put two and two together."[3]

In the week following her discharge Dickerson visited the office of the Unemployment Compensation Board and spoke with one of the representatives there. This representative informed Dickerson that the reason given by the Respondent for her discharge was "excessive absenteeism."

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2. For the most part the testimony above quoted concerning Minter's final conversations with Dickerson is that of Dickerson. Minter, in contrast with Dickerson's testimony to the effect that she asked for a raise for the girls in her department, testified that Dickerson had opened the conversation by asking "if she was going to get a raise." Aside from this, however, Minter's version does not differ materially from Dickerson's. Except as above indicated, Minter did not deny any of the details of the conversation recited above. Since Dickerson at the very time she was talking to Minter was engaged in promoting a petition to obtain a wage increase for all of the girls, I find unlikely that she would have asked for an increase for herself alone. Under all the circumstances, I credit Dickerson's version and find the facts to be as stated in the text above.

3. The foregoing findings are based on the uncontradicted testimony of Petersen and Robinson.

When she disputed the validity of such an explanation, this representative added, "Well, if you must know, they also had you listed as a troublemaker."

About this same time Dickerson telephoned Robert Warren, the Respondent's personnel manager, and inquired about receiving prorated vacation pay. (In one more month Dickerson would have been entitled to a full year's vacation.) Warren replied that he would call her and let her know. A week later, having heard nothing further from Warren in the meantime, Dickerson called him back at the plant. Warren informed her that he had looked into the matter and found out that the Company was not obligated to pay her any vacation pay. After expressing her dissatisfaction with this turn of events, Dickerson asked Warren "why he turned [her] in as a troublemaker to the unemployment office." When Warren expressed surprise, Dickerson queried him, "Well, if you didn't turn me in as one who did?" Warren replied that he had merely turned in Frank Minter's statement. She sought to find out the contents of Minter's statement, but they were not made available to her. In the ensuing conversation, which was rather lengthy, Dickerson expressed her resentment against having been "fired unjustly" and "turned . . . in as a troublemaker." Warren offered to attempt to have the record at the Unemployment Compensation Board straightened out so as to eliminate the reference to her as a "troublemaker."

C. *The Respondent's contentions; conclusions*

Admittedly Dickerson was discharged by Supervisor Minter upon the basis of a decision made by Minter upon his own initiative during the conversation with Dickerson on the morning of April 4. When asked by his attorney at the hearing, "Why did you fire Mrs. Dickerson," Minter

replied, "she asked me to. She practically demanded that I fire her." Admittedly, Minter had no intention of discharging Dickerson when she started the conversation with him on April 4. Minter did add, however, that he was under the assumption that Dickerson was going to quit anyway when school was out because she did not like to work when it was hot. At another point in his testimony Minter stated that he had been told by others (not Dickerson) that such were Dickerson's intentions. There is no contention made that the quality of Dickerson's work had anything to do with her discharge.

Although Minter did not testify that Dickerson's absenteeism played a part in his decision to discharge her, he did state that several of the girls had complained about Dickerson being off from work so much and that he had criticized Dickerson "in a very nice way that she should not be off as much as she was unless she had a good reason for it."

While admitting that he was aware that a petition was being circulated prior to Dickerson's discharge, Minter denied knowing that Dickerson had anything to do with circulating it. Minter also testified that the fact that a petition was being circulated had nothing to do with Dickerson's discharge. For the reasons set forth below I do not credit Minter's testimony in this regard for I do not consider it consistent with the undisputed facts of the case and the inferences reasonably drawn therefrom.

The uncontradicted testimony of Dorothy Cohorn and Mary Petersen shows that Minter disapproved of concerted attempts by employees to obtain improved wages, hours, or working conditions. The record also shows that Minter suspected that Dickerson was responsible for the circulation of a petition. Thus, after her discharge Minter told

Dickerson that he suspected her of being behind the petition, but had not known for sure until she handed him the petition. This is Dickerson's uncontradicted testimony, which is corroborated by that of Madeline Robinson who testified without contradiction to the effect that Minter had told her after Dickerson's discharge that he had not known definitely until Dickerson gave it to him "that she was the one that had the petition," but that he had "just put two and two together."

Dickerson was abruptly discharged in the course of a discussion with Minter in which she was vigorously pressing her request for a wage increase for the girls, which was the subject of the petition. Minter's remark to Dickerson at the time—"if she was so unhappy with the wages and conditions why didn't she quit"—plainly reveals his desire to get rid of Dickerson.

Minter's explanation for Dickerson's discharge, that she had practically demanded it, scarcely withstands scrutiny. Far from inviting a discharge, Dickerson was making known as forcefully as she could that she wanted to hang on to her job, that the only way the employment relationship would be terminated would be by the action of the Respondent. Minter, in my opinion, chose to interpret Dickerson's comment as an invitation to discharge her because he was so eager to get rid of her. Upon all of the facts of the case, I conclude that Minter would not have reacted in this fashion and summarily dismissed an otherwise satisfactory employee[4] had he not suspected that

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4. While Minter mentioned Dickerson's alleged absenteeism in his testimony, the record as a whole does not support the conclusion that this was a factor of any significance in Dickerson's discharge. Absenteeism was not mentioned to her at the time of her discharge. It does not appear that Dickerson was criticized when she returned after her last absence, 2 weeks before her discharge.

Dickerson was a leader in the concerted activity which he knew was then going on in the plant.[5]

It is the position of the Respondent that discussions among the employees of their desire for wage increases were common in the plant, as were requests to the Respondent to grant wage increases, and that in these circumstances it is unreasonable to attribute Dickerson's discharge to her efforts to obtain a wage increase. While it is true that discussions among the employees themselves of

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although she overstayed her leave 1 day without calling in promptly. At the hearing Dickerson testified that she became ill while on leave. I conclude that Dickerson's alleged absenteeism was an afterthought, arrived at by Minter when he was considering reasons for her discharge to give to the Unemployment Compensation Board.

5. Support for this conclusion is found also in Dickerson's testimony that the representative of the Unemployment Compensation Board informed her that the Respondent had stated as an additional reason for Dickerson's discharge that she was a "troublemaker." No effort was made by the Respondent at the hearing to substantiate this contention. On the record in this case, the only actions of Dickerson which conceivably could be regarded by the Respondent as troublesome to it were her efforts to obtain a wage increase for the girls in her department, both by circulating the petitions and by personally urging that Minter recommend such increases. It is recognized that Dickerson's testimony relied upon in this connection is hearsay. However, in view of Dickerson's undenied testimony concerning her subsequent conversations with Personnel Manager Warren in which she complained about the Respondent's reporting her to the Unemployment Compensation Board as a "troublemaker," Warren's promise to attempt to correct the record in this respect, and in view of the fact that the Respondent had it within its power, by furnishing copies of the documents given the Unemployment Compensation Board, to establish the exact nature of its representations to that Board and failed to do so, I find it reasonable to give weight to Dickerson's testimony in this regard as one of the bits of evidence casting light on Minter's motives in discharging Dickerson. See *Diaz v. United States*, 223 U.S. 442, 450.

their desire for a wage increase were frequent, these desires were not made known to the Respondent except upon a strictly individual basis. The record shows that the employees sought to keep all actions of a concerted nature under cover and that they feared the consequences of having engaged in concerted activities becoming known to the Respondent until they succeeded in obtaining widespread participation by the employees. For these reasons I must reject the Respondent's contention in this regard. The Respondent further contends that Minter believed that Dickerson intended to quit in 2 months and that this was a contributing factor in his decision to discharge her. Even if Minter had had an adequate factual basis for this conclusion as to Dickerson's intentions, I am convinced that at most this was a very minor factor in his decision, and that Dickerson would not have been discharged but for Minter's suspicion that she was the employee who was responsible for circulating the petition. Under all the circumstances, I conclude that the Respondent's discharge of Dickerson on April 4, 1963, was violative of Section 8(a)(1) of the Act.

IV. Conclusions of law

The Respondent by discharging Betty R. Dickerson because it suspected she was circulating a petition relating to wages, hours or working conditions in the plant, and by questioning employees about the preparation, circulation, and signing of the petition, has thereby engaged in interference, restraint, and coercion of employees in the exercise of their right to engage in concerted activities for their mutual aid or protection, in violation of Section 8(a)(1) of the Act.

V. The remedy

My Recommended Order will contain the conventional remedial provisions for the unfair labor practices

found, namely that the Respondent cease and desist from its unfair labor practices, that it reinstate Dickerson with backpay, computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 138 NLRB 716, and that it post appropriate notices.

The unfair labor practices herein found, including the discharge of an employee for engaging in activities protected by the Act, are such as to indicate an attitude of opposition to the purposes of the Act generally. In these circumstances a broad cease and desist provision is necessary to effectuate the policies of the Act.

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, the undersigned Trial Examiner hereby issues the following:

RECOMMENDED ORDER

The Respondent, Duo-Bed Corporation, Wichita, Kansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or taking other retaliatory action against employees engaging in, or suspected of engaging in, concerted activities for the purpose of collective bargaining or other mutual aid or protection, from questioning employees about such activities, and in any manner interfering, restraining, or coercing employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Reinstate Betty R. Dickerson to her former or a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole

in the manner set forth in the section hereof entitled "The remedy."

(b) Preserve and make available to the Board or its agents, upon request, all payroll and other records relevant to a determination of the amount of backpay due under the terms of this Recommended Order.

(c) Post in conspicuous places at its plant in Wichita, Kansas, including all places where notice to employees are customarily posted, copies of the notice attached hereto as Appendix.[6] Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director in writing within 20 days from receipt of this Recommended Order what steps the Respondent has taken to comply herewith.[7]

Dated at Washington, D. C.

/s/ Owsley Vose
Trial Examiner

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6. In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

7. In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, either by discharging employees engaging in or suspected of engaging in such activities, by questioning employees about employee petitions to management, or in any other manner.

WE WILL immediately reinstate Betty R. Dickerson with backpay.

DUO-BED CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional office, 1200 Rialto Building, 906 Grand Avenue, Kansas City, Missouri 64106 (Tel. No. Baltimore 1-7000 Ext. 2732), if they have any question concerning this notice or compliance with its provisions.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
September Term, 1964

DUO-BED CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 7695

On Petition for Review of an Order of the National Labor Relations Board

Gerrit H. Wormhoudt (Wayne Coulson, Paul R. Kitch, Dale M. Stucky, Donald R. Newkirk, Robert J. Hill, Philip Kassebaum, John E. Rees and Robert T. Cornwell, and Hugo T. Wedell, of counsel, were with him on the brief) for Petitioner.

Harold Shore (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Melvin Pollack were with him on the brief) for Respondent.

Before LEWIS, BREITENSTEIN and SETH, Circuit Judges.

LEWIS, Circuit Judge.

Petitioner seeks review of an order of the National Labor Relations Board requiring it to take designated remedial action for violations of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. Petitioner asserts that it is aggrieved by the Board order because it was denied a fair hearing through the repeated

errors and gross prejudice of the trial examiner and because there is no substantial evidence to support the critical findings that petitioner engaged in coercive questioning of its employees regarding protested activities and that petitioner discharged employee Betty R. Dickerson for requesting a wage increase for herself and her fellow employees. The Board, by cross-petition, seeks enforcement of its order.

Although petitioner has accurately pointed out some discrepancy between the trial examiner's recital of the evidence and the actual testimony, we find nothing in our review of the record as a whole that indicates abuse of the administrative process through either error or prejudice. The report of the trial examiner contains a careful consideration of petitioner's contentions and a rejection of them for stated reasons, which, though undoubtedly unsatisfactory to petitioner, do not indicate the eager attitude of prejudice.

The ultimate findings of the Board concerning violations are supported by the record. Petitioner's supervisor interrogated several employees concerning the circulation of a petition for a wage increase in an attempt to learn who was leading the movement and who had signed the petition, and cautioned the employees that such activity was "no way to get a raise." The employee, Dickerson, author of the petition, was discharged in midday and, although she was a dissident and annoying employee, the evidence is susceptible of the inference that she was discharged for her activity in regard to the petition. Since the province of drawing permissible inferences lies with the Board, our inquiry ends there. NLRB v. Bear Brand Roofing, Inc., 10 Cir., 312 F.2d 616, 618.

The order of the Board is not unduly broad and will be enforced.

APPENDIX C

Decree, enforcing
Eighth Day, November Term, Wednesday,
November 25th, 1964

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Oliver Seth, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Duo-Bed Corporation, to review and set aside a certain order issued against it by the National Labor Relations Board on February 5, 1964, and upon the Board's answer and cross petition to enforce said order. The Court heard argument on September 17, 1964, and has considered the briefs and transcript of record filed in this cause. On October 22, 1964, the Court being fully advised in the premises, handed down its decision denying the petition to review and granting the petition to enforce.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and Duo-Bed Corporation, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

DAVID T. LEWIS
Judge, United States Court of Appeals for the Tenth Circuit

DATED: November 25, 1964.